(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNNE KALINA,

Petitioner,

v.

RODNEY FLETCHER,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a prosecutor who has brought formal criminal charges against a defendant entitled to absolute immunity from 42 U.S.C. § 1983 liability when, pursuant to state statute and court rule, she causes an arrest warrant to issue for the purpose of bringing the defendant before the court to respond to the charges brought; as to which the United States Courts of Appeals are in conflict?

LIST OF PARTIES

The parties to the proceeding below are petitioner Lynne Kalina, a King County Deputy Prosecuting Attorney, who was Defendant-Appellant below, and respondent Rodney Fletcher who was Plaintiff-Appellee below.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed August 22, 1996.

OPINIONS BELOW

The decision of the Court of Appeals is reported at 93 F.3d 653 (9th Cir. 1996) and is reproduced in the Appendix at 1a through 7a. The district court's Minute Order denying summary judgment is reproduced in the Appendix at 8a.

JURISDICTION

The Court of Appeals' decision was filed and judgment entered on August 22, 1996.[1] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

R.C.W. 36.27.020 provides in part:

> The prosecuting attorney shall:
>
> . . .
>
> (6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

The full text of R.C.W. 36.27.020 is reproduced in the appendix at 24a through 26a.

R.C.W. 10.37.010 provides:

> No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state,

[1] App. at 1a.

and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

This statute is reproduced in the appendix at 27a.

COURT RULES INVOLVED

Washington Criminal Rule 2.1 provides in part:

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) *Nature*. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It shall be signed by the prosecuting attorney. . . .

The full text of Washington Criminal Rule 2.1 is set forth in the Appendix at 19a through 20a.

Washington Criminal Rule 2.2 provides in part:

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in R.C.W. 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved

and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

The full text of Washington Criminal Rule 2.2 is set forth in the Appendix at 21a through 23a.

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Mr. Fletcher filed his federal lawsuit alleging that Ms. Kalina violated his civil rights when she initiated criminal charges against him and sought an arrest warrant to secure personal jurisdiction.

On November 30, 1992, the Seattle Police Department presented an investigative report on a burglary case to the King County Prosecuting Attorney. The suspect was Mr. Fletcher and Ms. Kalina was the assigned deputy prosecutor.[2]

Ms. Kalina reviewed the written report and determined that the prosecuting attorney's office would bring criminal charges against Mr. Fletcher. As part of her initiation of the prosecution, Ms. Kalina prepared and signed an Information charging Mr. Fletcher with burglary in the second degree, a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail, and a Certification for Determination of Probable Cause. These charging documents were filed with the King County Superior Court on December 14, 1992. On the same day, the Honorable Carmen Otero, King County Superior Court Judge, granted the Motion and ordered that an arrest warrant be issued for Mr. Fletcher.[3]

On September 24, 1993, Mr. Fletcher was arrested and held for prosecution on the burglary charges. A few

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[2] App. at 10a to 11a.

[3] App. at 10a to 18a.

weeks later, the King County Prosecuting Attorney determined that the information upon which it had based its prosecution was erroneous and asked that the charges be dismissed. The trial court granted the motion.

Ms. Kalina's followed Washington State law when she initiated the prosecution against Mr. Fletcher. In Washington State, by statute and court rule, the county prosecutor is permitted to initiate felony criminal charges by grand jury indictment, complaint or information.[4] Most criminal felony charges filed in Washington State courts are initiated by information, rather than by complaint or indictment.

To comply with *Gerstein v. Pugh*, 420 U.S. 103 (1975), the prosecuting attorney also files a certification or affidavit signed by the prosecuting attorney setting forth the essential facts constituting probable cause for charging the defendant. The deputy prosecutor obtains these facts from the police reports and summarizes them in his or her affidavit.[5] If the certification or affidavit establishes probable cause, the court may issue an arrest warrant at the request of the prosecuting attorney.[6] Prosecutors utilize this procedure to comply with Washington State law which imposes a duty on the prosecutor to institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies.[7]

This case arose when Ms. Kalina followed this Washington law and caused an arrest warrant to issue for Mr. Fletcher. In his federal lawsuit, Mr. Fletcher contends, and it was assumed for purposes of summary judgment,

[4] Washington Criminal Rule 2.1, App. at 19a; R.C.W. 10.37.010, App. at 27a.

[5] App. at 17a to 18a.

[6] Washington Criminal Rule 2.2, App. at 21a.

[7] R.C.W. 36.27.020(6), App. at 24a.

that the certification contained facts which Ms. Kalina knew or should have known were inaccurate. Ms. Kalina contends that, regardless of the inaccurate information, she is antitled to absolute prosecutorial immunity because she was clearly acting as an advocate, not as an investigator.

A. The Proceedings Below

1. *The District Court Opinion*

The District Court denied Ms. Kalina's motion for summary judgment by a Minute Order which simply concluded that she was not entitled to absolute prosecutorial immunity.[8]

2. *The Court of Appeals Decision*

Ms. Kalina took an interlocutory appeal to the United States Court of Appeals for the Ninth Circuit pursuant to the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); 28 U.S.C. § 1291. A unanimous three-judge panel of the Court of Appeals, relying on this Court's decisions in *Malley v. Briggs*, 475 U.S. 335 (1986), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), affirmed the District Court and held that a "prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant" regardless of when and how the warrant was sought.[9] In its decision, the Court of Appeals noted that "the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant."[10] The Court of Appeals also recognized that a Tenth Circuit ruling was in accord with the Sixth Circuit.[11] The Court of Appeals declined to follow the Sixth

[8] App. at 8a.

[9] *Fletcher v. Kalina*, 93 F.3d 653, 655; App. at 5a, 6a n.2.

[10] *Id.* at 656; App. at 6a.

[11] *Id.* at 656 n.3; App. at 6a to 7a, n.3.

Circuit because it predated *Buckley* and similarly rejected the Tenth Circuit's reasoning because it predated both *Malley* and *Buckley*.[12]

3. *Post-Decision Proceedings*

On the motion of Petitioner, the Ninth Circuit's mandate has been stayed pending final disposition by the Supreme Court.[13]

REASONS FOR GRANTING THE PETITION

This case presents an issue of first impression for the Court: Whether a prosecuting attorney who has filed formal criminal charges against a defendant, is entitled to absolute immunity for causing an arrest warrant to issue which compels the defendant to appear and respond to the charges filed. The Ninth Circuit observed that its resolution of this issue directly conflicts with decisions from the Sixth and Tenth Circuits.[14] Moreover, the Ninth Circuit failed to address the conflict its decision creates with opinions from the Third and Fourth Circuits, where prosecuting attorneys receive absolute immunity when seeking seizure warrants in civil forfeiture proceedings. Such warrants are directly analogous to arrest warrants.[15] This Court should grant review to resolve these conflicts and clarify the law in this important case.

The Ninth Circuit's decision has negative ramifications for all prosecuting officials practicing within the Ninth Circiut because it chills the responsible exercise of a prosecutor's charging function. Under this Court's precedent,

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[12] *Id.* at 656; App. at 6a to 7a.

[13] App. at 9a.

[14] There is also an apparent conflict with *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993) which reached a result similar to the Ninth Circuit.

[15] *See, Schrob v. Catterson*, 948 F.2d 1402 (3rd Cir. 1991); *Erlich v. Giuliani*, 910 F.2d 1220 (4th Cir. 1990).

the prosecutor's decision to file charges and all actions taken in conjunction with that decision have consistently been accorded absolute immunity. The Ninth Circuit's decision jeopardizes the rule of prosecutorial advocacy and immunity; it must be overturned.

I. THE NINTH CIRCUIT'S DENIAL OF ABSOLUTE IMMUNITY CONFLICTS WITH THE DECISIONS OF OTHER APPELLATE COURTS THAT HAVE CONSIDERED THE ISSUE.

The Ninth Circuit ruled that a prosecuting attorney who causes an arrest warrant to issue for a defendant against whom formal criminal charges have been filed is not entitled to absolute immunity. The Sixth Circuit reached precisely the opposite conclusion.[16] In both instances a prosecuting attorney allegedly used false statements to cause an arrest warrant to issue. Under these circumstances, the Sixth Circuit held:

> Even taking as true, as we must for purposes of this appeal, the allegations that the prosecutors knowingly obtained issuance of criminal complaints and arrest warrants against the Josephs based on false, coerced statements elicited from Morrow by the prosecutors and police, we find that such conduct, however reprehensible, would be protected by absolute immunity. The decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in "initiating a prosecution," which is protected under *Imbler*, 424 U.S. at 431, 96 S.Ct. at 995.[17]

This Court denied certiorari.[18]

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[16] *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987).

[17] *Id.* at 555.

[18] *Joseph v. Patterson*, 481 U.S. 1023 (1987).

The Tenth Circuit also applied absolute immunity to prosecuting attorneys who requested arrest warrants. The Tenth Circuit reasoned:

> As for the arrest, both before and after *Imbler*, a prosecutor's absolute immunity has extended to his procurement of an arrest warrant. *See, e.g., Martinez v. Chavez*, 574 F.2d 1043 (10th Cir. 1978); *Smart v. Jones*, 530 F.2d 64 (5th Cir.), *cert. denied*, 429 U.S. 887, 97 S.Ct. 240, 50 L.Ed.2d 168 (1976); *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950); *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd*, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 395 (1927). . . . To be sure, a prosecutor typically seeks an arrest warrant in an *ex parte* proceeding, in which there is no counterargument by opposing counsel to lessen the danger of prosecutorial misconduct. Nevertheless, we think a prosecutor's seeking an arrest warrant is too integral a part of his decision to file charges to fall outside the scope of *Imbler*. The purpose of obtaining an arrest warrant is to ensure that the defendant is available for trial and, if found guilty, for punishment. Without the presence of the accused, the initiation of a prosecution would be futile. Thus, a prosecutor's seeking a warrant for the arrest of a defendant against whom he has filed charges is part of his "initiation of prosecution" under *Imbler*.[19]

The Ninth Circuit's decision also conflicts with the reasoning of decisions from the Third and Fourth Circuits.[20] These Courts found that a seizure warrant in a civil forfeiture case is analogous to an arrest warrant. The Courts recognized that one of the critical advocatory duties of a prosecuting attorney is to ensure that defendants, or in

[19] *Lerwill v. Joslin*, 712 F.2d 435, 437-38 (10th Cir. 1983).

[20] *See, Schrob v. Catterson, supra*; and *Erlich v. Giuliani, supra*, n.13.

[21] *Schrob v. Catterson, supra*, at 1416.

this context the assets, are physically present at trial.[21] Both circuits grant absolute immunity under these circumstances.

This Court should grant certiorari to resolve the conflicts created by the Ninth Circuit's error and to guide all prosecuting officials as to what protection they can expect when they fulfill their duty to bring charged defendants before the court.[22]

II. THE NINTH CIRCUIT'S DECISION IS IN CONFLICT WITH ESTABLISHED SUPREME COURT JURISPRUDENCE.

Recently this Court reaffirmed the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings and occurring in the course of his/her role as an advocate for the State are entitled to the protection of absolute immunity.[23] The Ninth Circuit's decision in this case violates this basic principle. Pursuant to Washington State law, the prosecuting attorney has an affirmative duty to institute and prosecute proceedings before magistrates for the arrest of persons charged with a felony.[24] Thus, procuring arrest warrants is an advocatory role mandated by Washington statutory law. Moreover, procuring an arrest warrant is a necessary step in preparing for and conducting a successful prosecution.[25] The Ninth Circuit failed to respect the state law

[22] The Ninth Circuit relied, in part, on *Kohl v. Casson*, a 1993 decision from the Eighth Circuit. *Fletcher v. Kalina, supra*, at 655. However, a careful reading of that decision demonstrates that the conduct in question occurred during the investigative preindictment phase of the judicial process and not as part of the initiation and conduct of a criminal prosecution. In any event, the Ninth Circuit's reliance on this decision creates further conflict among the Circuits.

[23] *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

[24] R.C.W. 36.27.020(6), App. at 24a.

[25] As the Sixth and Tenth Circuits recognize, securing the person of the defendant is so intimately associated with the judicial process that it warrants a grant of absolute immunity.

concerning charging, failed to acknowledge the advocacy role of the deputy prosecutor in bringing a defendant to court to answer charges and rejected the functional analysis employed by this Court.

The relevant inquiry under the functional analysis is the "nature" and "function" of a particular act, not the "act itself".[26] Ms. Kalina's act was requesting and receiving from the trial court an arrest warrant against a charged defendant. The Ninth Circuit's opinion disregards the nature and function of that act within the context of the judicial process, under Washington State law. Rather, the Court isolated the act itself and erroneously concluded that, because this Court has held in *Malley v. Briggs*, 475 U.S. 335 (1986), that a police officer who applies for an arrest warrant is not entitled to absolute immunity, absolute immunity is not available to a prosecuting attorney who also applies for an arrest warrant.[27] However, the nature and function of the act in the present case is substantially different than the nature and function of the act performed by the police officer in *Malley*.

In *Malley*, the police officer was operating in Rhode Island, a state which uses a grand jury to initiate criminal prosecutions. The police officer filed a criminal complaint with the prosecuting attorney who then independently determined whether to seek an indictment. This Court distinguished the police officer, who files a criminal complaint and warrant request, from the prosecuting attorney who actually seeks the indictment. This Court noted that

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[26] *Mireles v. Waco*, 502 U.S. 9 (1991). In *Mireles*, this Court granted certiorari and summarily reversed a decision of the Ninth Circuit denying immunity to a judge who allegedly instructed police officers to use excessive force in bringing an attorney to the courtroom.

[27] *Fletcher v. Kalina, supra*, at 655-66 (1996), relying on *Malley v. Briggs*, 475 U.S. 335 (1986).

the police officer's act was further removed from the judicial process and thus, not entitled to absolute immunity.[28] The opinion left little doubt, however, that the act of seeking an indictment is an integral part of the judicial process and that a prosecuting attorney who does so is entitled to absolute immunity for that act and any acts undertaken in conjunction with that decision:

> . . . seeking an indictment is but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process.[29]

In Washingon State, the filing of the information is the functional equivalent of seeking an indictment,[30] an act entitled to absolute immunity. The arrest warrant flows from the issuance of the information and demonstration of probable cause, analogous to presentation of evidence to a grand jury and issuance of an indictment. When Ms. Kalina requested an arrest warrant at the time she filed the information, her act was not similar in nature and function to the police officer's request in *Malley*.[31] Clearly, the nature and function of Ms. Kalina's act was to secure

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[28] *Malley v. Briggs*, 475 U.S. 342-343.

[29] *Id.* at 343.

[30] Washington Criminal Rule 2.1, App. at 19a.

[31] Justice Kennedy's dissent in *Buckley* recognized that "[t]wo actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions" and that it would not be incongruous for one to receive immunity and the other not. *Buckley v. Fitzsimmons*, 509 U.S. at 289 (Kennedy, J., dissenting). The Ninth Circuit did not consider this possibility and, as a result, came to an erroneous result.

personal jurisdiction over the defendant so that he would appear in court to answer the charges. Trial in absentia is not favored and due process requires that a defendant be present in court in order for the state to continue the prosecution.[82] It was an integral step in the judicial process, unlike the police officer's request in *Malley*. Although the Ninth Circuit superficially acknowledged Supreme Court precedent, its opinion departs from the analysis this Court has traditionally applied to determine the extent of immunity available to prosecuting attorneys.

III. THE NINTH CIRCUIT DECISION WILL NEGATIVELY AFFECT THE ABILITY OF PROSECUTING OFFICIALS WITHIN THE NINTH CIRCUIT TO EFFECTIVELY DISCHARGE THEIR PROSECUTORIAL DUTIES.

The negative reverberations of the Ninth Circuit's decision will be felt, at a minimum, by each of the 39 counties in the State of Washington.[83] Each of those counties is bound by Washington Criminal Rules 2.1 and 2.2 as well as R.C.W. 36.27.020 which place an affirmative duty on prosecuting attorneys to engage in the conduct which the Ninth Circuit has found to be undeserving of the protection of absolute immunity.[84]

Thousands of felony prosecutions take place every year in the State of Washington. Prosecutors' offices run on limited local budgets and are thinly staffed. The pace of case filings is often fast because volume is so high, and

[82] *U.S. v. Gagnon*, 470 U.S. 522 (1985) (per curiam); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

[83] Given the breadth of the Court of Appeals ruling, it is obvious that other prosecuting officials within the Ninth Circuit will face similar problems with this decision. The Ninth Circuit's decision is the first to fail to grant immunity to an act which is part and parcel of the charging function. Consequently, filing charges in the Ninth Circuit is no longer an act which can be undertaken with the fearlessness the *Imbler* Court envisioned.

[84] App. at 21a to 24a.

cases are often filed on a rush basis. Stripping the cloak of immunity from an activity which is so closely related to the prosecuting attorneys' charging function will only serve to undermine the public policy considerations which form the foundation for prosecutorial immunity.[85] The Ninth Circuit has effectively limited prosecuting attorneys' choices as to how they can bring a defendant before the court to answer to the charges brought against him/her and, in the process, has provided a major disincentive to the vigorous and efficient enforcement of the law which should be the hallmark of the office of prosecuting attorney.[86]

The Ninth Circuit's erroneous decision immediately threatens prosecutorial resources in the State of Washington. Theoretically, hundreds of cases filed within the last three years could result in civil litigation simply because no conviction was returned. The only requirement a defendant turned litigant would need to meet would be to allege that the injury occurred as a result of the arrest rather than the prosecution. The Ninth Circuit's opinion has essentially converted what was once a substantial degree of protection for prosecuting attorneys into little more than a pleading rule.

[85] This Court has long expressed the concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his energy and attention from the pressing duty of enforcing the criminal law. *Imbler v. Pachtman*, 424 U.S. 409, 424-425. Thus, suits against prosecutors would devolve into a virtual retrial of the criminal offense in a new forum and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive not to go forward with a close case where an acquittal would likely trigger a suit against him for damages. *Id.*

[86] This Court has consistently adhered to the principle that the Federal Courts should not interfere with state criminal prosecutions. *See, Younger v. Harris*, 401 U.S. 37 (1971); *Moore v. Sims*, 442 U.S. 415 (1979). The Ninth Circuit's decision violates this principle.

While the vast majority of these cases would ultimately be resolved in favor of the prosecutor, the burden of having to conduct discovery and go to trial on each such case will necessarily divert scarce prosecutorial resources from their proper function. The decision below represents a major intrusion into the efforts of the states to prosecute crime and defend the citizens whom they serve.

CONCLUSION

In addressing an important issue of public policy, the Ninth Circuit has departed from the traditional approach adopted by this Court and misapplied this Court's prior holdings, creating a direct conflict with several other appellate courts that have considered the issue. The Ninth Circuit has exposed one of the central actors in the judicial process to the very real prospect of retaliatory litigation for actions taken during the initial phase of her/his statutorily mandated duties. Prosecutors will be unable to freely exercise the independent judgment vital to the efficient administration of the criminal justice process and early participation by prosecutors in that process will be discouraged if this decision is not overruled.

For these reasons, this Court should grant the Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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November —, 1996

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129
D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,
v.

LYNNE KALINA,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington
Thomas S. Zilly, District Judge, Presiding

Argued and Submitted
August 7, 1996—Seattle, Washington

Filed August 22, 1996

Before: Eugene A. Wright, Robert R. Beezer and
Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Wright

OPINION

WRIGHT, Circuit Judge:

We must decide whether a state prosecutor who allegedly made false statements in an affidavit supporting an application for a search warrant should be accorded absolute immunity. We hold that, based on *Malley v. Briggs*, 475 U.S. 335, 342 (1986) and the functional analysis test, the prosecutor is not entitled to absolute immunity. We affirm and remand.

BACKGROUND:

In determining immunity, we must accept the plaintiff's allegations as true. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993). Lynne Kalina, a deputy prosecutor, was assigned to work on a case involving alleged theft of computer equipment from a private school in Seattle. She prepared an application for an arrest warrant and an information charging Rodney Fletcher with second-degree burglary. The warrant application was accompanied by a "Certification for Determination of Probable Cause," a sworn declaration describing the result of the police investigation. Based on this document, which she signed, the court issued an arrest warrant for Fletcher. The burglary charge was eventually dismissed when Fletcher's attorney discovered inaccuracies in the certification.

Fletcher brought a 42 U.S.C. § 1983 claim against Kalina in federal district court alleging civil rights violations. He contends that the certification contained information that Kalina knew or should have known was false. First, it said that Fletcher "has never been associated with the school in any manner and did not have permission

to enter the school or to take any property." Fletcher alleged that he had been hired by the school to install the glass partition on which his prints were found and that he had permission to enter the school. Second, the certification said that an electronics store employee identified Fletcher as the man who attempted to sell him computer equipment from the school. Fletcher contended that police reports indicated that no witness had identified him as a suspect although two were shown photo montages.

Upon a motion for summary judgment, the district court denied Kalina absolute immunity and held that qualified immunity was a question of fact to be determined at trial. This interlocutory appeal followed. *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); 28 U.S.C. § 1291. We review de novo. *Jesinger v. Nevada Fed. Cred. Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

ANALYSIS:

Whether a state prosecutor is entitled to absolute or qualified immunity for her actions in procuring an arrest warrant is an issue of first impression in this circuit. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court first considered absolute immunity for prosecutors. The Court recognized that the prosecutor's job is both difficult and essential. It noted that the "office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict?" *Id.* at 422-24. The Court held that prosecutors were absolutely immune from prosecution for their actions during the initiation of a criminal case and its presentation at trial. The Court described these functions as "intimately associated with the judicial phase of the criminal process." *Id.* at 424.

The Court later explicitly held that when prosecutors perform administrative or investigative, rather than advo-

catory, functions they do not receive absolute immunity. *See Burns v. Reed*, 500 U.S. 478, 494-96 (1991). To determine whether an action is administrative/investigative or advocatory, we apply a "functional" analysis. *See id.* at 486. We look at "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). It follows that, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Since *Imbler*, the Court has addressed prosecutorial immunity in two cases. In *Burns*, 500 U.S. at 487, it held that a prosecutor is absolutely immune for his conduct in presenting evidence at a probable-cause hearing for a search warrant, but is not absolutely immune when giving legal advice to the police on whether they have probable cause to arrest. The Court reasoned that appearing in court and presenting evidence were "clearly" advocatory. *Id.* at 491. It did not believe, however, that advising the police on whether they could hypnotize a witness and whether they had probable cause to arrest was so closely associated with the judicial process that it required absolute immunity. *Id.* at 493. The Court emphasized that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Id.* at 486-87.

In *Buckley*, 509 U.S. at 273, the Court held that a prosecutor is not absolutely immune when he allegedly fabricates evidence during the investigation by retaining a dubious expert witness. The Court reasoned that, because the prosecutor did not yet have probable cause to arrest at the time he was shopping for an expert witness, the function was investigative, not advocatory.[1] The Court commented that:

[1] The Court also held that the prosecutor's allegedly false statements during a press confeernce were not protected by absolute immunity because the comments had no direct tie to the judicial process and because out-of-court statements to the press were not absolutely immune at common law. *See Buckley*, 509 U.S. at 276-78.

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Id. (citation omitted).

The Supreme Court has never addressed whether a prosecutor is absolutely immune for conduct in obtaining a search warrant. In *Malley v. Briggs*, 475 U.S. 335, 342 (1986), however, the Court held that a *police officer* who secures an arrest warrant without probable cause cannot assert an absolute immunity defense.

The officer made two arguments, both rejected by the Court. He analogized himself to a complaining witness who files a certification. *Id.* at 340. The Court found this argument unavailing because complaining witnesses were not absolutely immune at common law. *Id.* at 340. The officer next argued that his action was similar to a prosecutor seeking an indictment, a function that merits absolute immunity. The Court also rejected this argument, reasoning that the officer's actions were "further removed from the judicial phase of criminal proceedings. . . ." *Id.* at 342-43.

Relying on *Malley* and *Buckley*, we hold that a prosecutor is not absolutely immune when preparing a declaration in support of an arrest warrant. *See also Kohl v.*

Casson, 5 F.3d 1141, 1146 (8th Cir. 1993) ("the function of seeking an arrest warrant is subject only to qualified immunity, not absolute immunity."). Kalina's actions in writing, signing and filing the declaration for an arrest warrant are virtually identical to the police officer's actions in *Malley*.[2]

Kalina argues that it is "standard practice" in King County for the prosecutor to prepare the certification, but the local rules do not limit who may prepare it. *See* Wash. Superior Ct. Cr. R. 2.2(a). If a police officer or complaining witness had filed the same certification, she or he would not receive absolute immunity. *See Malley*, 475 U.S. at 340-41. To hold that Kalina is absolutely immune for performing the same task would be inconsistent with the Court's functional analysis.

We note that the Sixth Circuit reached a different result when faced with a prosecutor's use of allegedly false, coerced statements to obtain an arrest warrant. In *Joseph v. Patterson*, 795 F.2d 549, 555 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987), the court held that the "decision to file a criminal complaint and seek issuance of an arrest warrant are quasi-judicial duties involved in 'initiating a prosecution,' which is protected under *Imbler*."[3] In light of more recent Supreme Court law and

[2] We are not persuaded by Kalina's argument that *Malley* can be distinguished based upon the time the declaration was filed. She argues that Officer Malley filed his declaration early in the case, which made his action investigatory. She contends that her declaration was filed later, making it an advocatory act. In *Malley*, 475 U.S. at 337, the application for an arrest warrant was filed simultaneously with the felony complaint. Here, the application for the arrest warrant was filed with the information. There is little, if any, distinction.

[3] Kalina also relies on *Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir. 1983)). In *Lerwill*, 712 F.2d at 437, the Tenth Circuit granted a prosecutor absolute immunity because "[i]n seeking a warrant for . . . arrest, [the prosecutor] was acting as an advocate for the

the Eighth Circuit's opinion in *Kohl*, we decline to follow the Sixth Circuit. *Joseph* was issued before the Supreme Court decided *Buckley*, which emphasized that it would be "incongruous" to expose police to potential liability while protecting prosecutors for the same act. Moreover, although decided shortly after *Malley*, the opinion does not consider that case in deciding whether seeking an arrest warrant merits absolute immunity.

Finally, Kalina argues that policy concerns dictate a finding of absolute immunity. Absolute immunity serves a vital public interest by protecting prosecutors from distracting and time-consuming litigation. The Supreme Court, however, has made it clear that qualified immunity is generally sufficient to protect against frivolous lawsuits. The district court explicitly noted that qualified immunity was a question of fact in this case. We emphasize that Kalina may be able to avoid liability by showing at trial that her conduct did not violate a clearly established right of which a reasonable person would have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has noted that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

CONCLUSION:

Kalina is not absolutely immune for her actions in filing a declaration for an arrest warrant. We AFFIRM the denial of summary judgment and REMAND for further proceedings.

State before a neutral magistrate." This case, however, predates *Malley*, *Burns* and *Buckley*.

[Filed Oct. 19, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable Thomas S. Zilly, U.S. District Judge:

The Court DENIES defendant's motion for summary judgment, docket no. 12. *Buckley v. Fitzsimmons*, 509 U.S. ——, 125 L.Ed.2d 209, 112 S. Ct. 2606 (1933); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986); *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S. Ct. 984 (1976). The Court concludes that defendant is not entitled to absolute immunity. *Buckley v. Fitzsimmons*, 509 U.S. ——, 125 L.Ed.2d 209, 113 S. Ct. 2606 (1933); *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 106 S. Ct. 1092 (1986). Whether qualified immunity will apply in this case is a question of fact.

The Clerk of the Court is directed to send a copy of this Minute Order to all counsel of record.

Filed and entered this 19th day of October, 1995.

BRUCE RIFKIN
Clerk

By /s/ Casey Condon
Deputy Clerk

[Filed. Sep. 18, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-36129

D.C. No. CV-95-00379-TSZ

RODNEY FLETCHER,
Plaintiff-Appellee,

v.

LYNNE KALINA,
Defendant-Appellant.

ORDER

Before: WRIGHT, Circuit Judge.

Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED. Fed. R. App. P. 41(b).

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HONORABLE THOMAS S. ZILLY

No. C95-379Z

RODNEY FLETCHER,
Plaintiff,

v.

LYNNE KALINA,
Defendant.

AFFIDAVIT OF LYNNE KALINA

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Lynne Kalina, being first duly sworn on oath, deposes and states as follows:

1. I am a Deputy Prosecuting Attorney for King County and have been so employed since October 15, 1990. I have personal knowledge of the matters contained herein and I am competent to testify.

2. In November, 1992, I was assigned to the filing unit within our office. My duties in that position included the review of cases referred by various police agencies for the purpose of determining whether criminal charges should be filed. On November 30, 1992, the Seattle Police Department referred a burglary case to our office in which the suspect was the plaintiff, Rodney Steven Fletcher. I reviewed this case and determined that our office would file criminal charges against Mr. Fletcher.

3. On or about December 7, 1992, I personally prepared an Information charging Mr. Fletcher with Burglary in the Second Degree. A true and correct copy of that Information is attached hereto as exhibit A. On that same date, I also prepared a Motion and Order Determining the Existence of Probable Cause, Directing Issuance of Warrant and Fixing Bail (attached as Exhibit B) and a Certification for Determination of Probable Cause (attached as Exhibit C) which I personally signed.

4. All three of the documents referred to in paragraph 3 above where filed with the King County Superior Court on December 14, 1992. That same day, the Honorable Carmen Otero granted my motion and ordered that an arrest warrant be issued for Mr. Fletcher so that he could be brought before the Court to respond to the charges against him.

5. The filing of the Information and request for the arrest warrant were done contemporaneously as a part of the initiation of the prosecution against Mr. Fletcher.

/s/ Lynne Kalina
LYNNE KALINA

EXHIBIT A

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
Plaintiff,

v.

RODNEY STEVEN FLETCHER,
Defendant.

INFORMATION

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse RODNEY STEVEN FLETCHER of the crime of Burglary in the Second Degree, committed as follows:

That the defendant RODNEY STEVEN FLETCHER in King County, Washington during a period of time intervening between July 26, 1992 through July 27, 1992, did enter and remain unlawfully in a building, located at 3401 Southwest Myrtle Street, Seattle (Our Lady of Guadalupe School), in said county and state, with intent to commit a crime against a person or property therein;

Contrary to RCW 9A.52.030, and against the peace and dignity of the State of Washington.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #91002
Deputy Prosecuting Attorney

EXHIBIT B

[Filed Dec. 14, 1992]

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

No. 92-1-07863-1

THE STATE OF WASHINGTON,
Plaintiff,

v.

RODNEY STEVEN FLETCHER,
Defendant.

MOTION AND ORDER DETERMINING THE EXISTENCE OF PROBABLE CAUSE, DIRECTING ISSUANCE OF WARRANT AND FIXING BAIL

The plaintiff, having informed the court that it is filing herein an Information charging the defendant with the crime of Burglary in the Second Degree now moves the court for an order determining the existence of probable cause and directing the issuance of a warrant for the arrest of the defendant, and

( ) fixing the bail of the defendant in the amount of ———, cash or approved surety bond.

(X) directing the release of the defendant, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

In connection with this motion, the plaintiff offers the information on the Suspect Information Report attached to this motion and the affidavit attached to the Information.

NORM MALENG
Prosecuting Attorney

By: /s/ Lynne Kalina
LYNNE KALINA
WSBA #9102
Deputy Prosecuting Attorney

ORDER

The court, having reviewed the affidavit submitted herein hereby determines that probable cause exists to believe that the above-named defendant committed the crime alleged in the Information herein; and

IT IS ORDERED that the Clerk of the Superior Court issue a warrant, returnable forthwith, for the arrest of the above-named defendant; and

IT IS FURTHER ORDERED that

( ) the bail of the defendant be fixed in the amount of ———, cash or approved surety bond.

(X) the defendant be released, after booking, on his or her personal recognizance and promise to appear for arraignment at the scheduled time and date.

IT IS FURTHER ORDERED that the defendant be advised of the amount of bail fixed by the court and/or conditions of his or her release, and of his or her right to request a reduction of bail and to be heard thereon. Service of the warrant by telegraph or teletype is authorized.

DONE IN OPEN COURT this 14 day of December, 1992.

/s/ Carmen Otero
Judge

Presented by:

/s/ Lynne Kalina
LYNNE KALINA,
WSBA #91002
Deputy Prosecuting Attorney

SUSPECT INFORMATION REPORT

CASE NO. 9 2 | 3 3 4 0 5 4

SEATTLE POLICE DEPARTMENT — UNIT 313 — B/TS 92- 276 FILE NO.

DATE OF REPORT	TIME	OFFENSE	B/A NUMBER
11-23-92	1300	BURGLARY	

BOOKING DATE	TIME

NAME (LAST, FIRST, MIDDLE - JR., SR., 1ST, 2ND, 3RD): FLETCHER, Rodney Steven

SEX: male — RACE: white

DATE OF BIRTH	STATE OR PROVINCE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SKIN TONE
092760	Minnesota	6-2	190	bln	blue	med

SCARS, MARKS, TATTOOS, ARTIFICIAL BODY PARTS, ETC.	CAUTION - ARMED, DANGEROUS	STATEMENT TAKEN?	OWN REAL PROPERTY?
	No	No	Unk

LAST KNOWN ADDRESS - CITY, STATE, ZIP	TELEPHONE NUMBER	DRIVER LICENSE NUMBER
24823 21st Ave S. Kent		FLETCRS40207

STATE	EXPIRES	SOCIAL SECURITY NUMBER	LOCAL NUMBER	FBI NUMBER	STATE ID NUMBER
XXX WA	92			583044W8	

FINGERPRINT CLASSIFICATION	ALIAS NAME(S)	VEH. LIC. NO.	STATE	EXP.

VEHICLE I.D. NO.	YEAR	MAKE	MODEL	STYLE	COLOR(S)

OCCUPATION	BUSINESS ADDRESS OR SCHOOL (COMPANY NAME - ADDRESS - DEPARTMENT OR SHOP NO. AND PHONE)
Laborer	Unk

MARITAL STATUS - CHILDREN (NO.)	LIVING WITH	TIME IN COUNTY	UNION AND LOCAL NUMBER
Unk			

INVESTIGATING OFFICER	SERIAL	UNIT	PHONE	APPROVING OFFICER
Det G K Ruedebusch	2734	313	386-1875	3537

CRIMINAL RECORD (CONVICTIONS)	ACTIVE PROBATION OR PAROLE — PROBATION OFFICER, PHONE — ☐ YES ☐ NO	NAME(S) OF ACCOMPLICE(S)
None		

ARRESTING AGENCY AFFIDAVIT

(CONCISELY SET FORTH FACTS SHOWING PROBABLE CAUSE FOR EACH ELEMENT OF THE OFFENSE AND THAT THE SUSPECT COMMITTED THE OFFENSE. IF NOT PROVIDED, THE SUSPECT WILL BE AUTOMATICALLY RELEASED. INDICATE ANY WEAPON INVOLVED).

On 7-26-92 between 1400 hrs and0650 hrs on 7-27-92 susp went to Our Lady of Guadalupe school, located at 3401 SW Myrtle St, Seattle, WA. Susp broke into VB and stole a computer, two printers and a modem. Susp's finger prints were I.D. inside VB in a location that could only be put there by the susp. Susp did not have permissinn to enter or remove anything from VB.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

11-23-92 SPD — DATE AND PLACE

Det G. Ruedebusch spd — SIGNATURE/AGENCY

1

LAW ENFORCEMENT POSITION ON RELEASE:
WOULD SAFETY OF INDIVIDUAL OR PUBLIC BE THREATENED IF SUSPECT RELEASED ON BAIL OR RECOGNIZANCE (CONSIDER HISTORY OF VIOLENCE, MENTAL ILLNESS, DRUG DEPENDENCY - BE SPECIFIC)? ANY OTHER REASONS WHY SUSPECT SHOULD NOT BE RELEASED (CONSIDER PRIOR FAILURE TO APPEAR, LACK OF TIES TO COMMUNITY - BE SPECIFIC).

NONE

2

ANTICIPATED DATE OF REFERRAL:	ANTICIPATED CHARGE:
11-24-92	BURGLARY

PRELIMINARY APPEARANCE INFORMATION — DATE:	JUDGE:	BOND POSTED — DATE: AMOUNT:$ CO:
P.D.: YES ☐ NO ☐	CONDITIONS:	

RETURN DATE:	RETURNED: YES ☐ NO ☐ / EXCUSED: YES ☐ NO ☐	NOT RELEASED ☐	BOND SET:$

EXHIBIT C

CAUSE NO. 92-1-07863-1

CERTIFICATION FOR DETERMINATION OF PROBABLE CAUSE

That Lynne Kalina is a Deputy Prosecuting Attorney for King County and is familiar with the police report and investigation conducted in Seattle Police Department case No. 92-334054;

That this case contains the following upon which this motion for the determination of probable cause is made.

Our Lady of Guadalupe School is located at 3401 Southwest Myrtle Street, Seattle, King County, Washington, George Christman is the custodian of the school. On July 27, 1992, at 6:50, Christman discovered that sometime during the previous night, the kitchen window had been pried open in a manner which would allow entry into the school. Christman called the police.

Investigation showed that the burglar had cut a hole in a plexiglass kitchen window, reached in, and pried open the window. The burglar had ripped out a restrictive bar to allow the window to open fully. Once inside the building, the burglar had searched through cabinets and forced open several doors. The burglar forced open a Coke machine, taking about $2 in change. The burglar had climbed over a glass partition into the school office and had taken a computer, two printers, and a modem. The burglar exited out of the office door.

Seattle Police Department Officer Burton was able to lift fresh latent prints from the partition and from a paper clip box which had been emptied. Seattle Police Department Identification Technician Holshue positively identified several prints lifted as Rodney Fletcher's prints. The defendant, Rodney Fletcher, has never been asso-

ciated with the school in any manner and did not have permission to enter the school or to take any property.

On July 27, 1992, at 2:30 p.m., the defendant entered Empire Electronics and contacted employee Lance Brandon. The defendant asked Brandon to give an appraisal on a computer which was in his car. Brandon went to a car which was occupied by Jerry Ward. Brandon told the defendant that the computer was worth about $200, but wanted to see if the computer was in working order before buying it. The defendant brought the computer into the store.

Brandon noticed that the computer's serial number had been removed. Brandon told the defendant that he needed the serial number, so the defendant left the store to retrieve the serial number. Brandon worked with the computer while the defendant was absent and noticed information on the hard drive indicating that the computer belonged to Our Lady of Guadalupe School.

Brandon called the police, but before the police arrived, the defendant and Ward returned to the store. Brandon told the defendant that he could not buy the computer because the defendant did not have any identification. The defendant took the computer and left the store. Brandon later identified the defendant from a photo montage.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct. Signed and dated by me this 7 day of December, 1992, at Seattle, Washington.

/s/ Lynne Kalina
LYNNE KALINA
WSBA #91002

WASHINGTON CRIMINAL RULE 2.1

RULE 2.1 THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. The initial pleading by the State shall be an indictment or an information in all criminal proceedings filed by the prosecuting attorney.

(1) *Nature.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It shall be signed by the prosecuting attorney. Allegations made in one count may be incorporated by reference in another count. It may be alleged that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice.

(2) *Contents.* The indictment or the information shall contain or have attached to it the following information when filed with the court:

(i) the name, address, date of birth, and sex of the defendant;

(ii) all known personal identification numbers for the defendant, including the Washington driver's operating license (DOL) number, the state criminal identification (SID) number, the state criminal process control number (PCN), the JUVIS control num-

ber, and the Washington Department of Corrections (DOC) number.

(b) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(c) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within 10 days after arraignment or at such later time as the court may permit.

(d) Amendment. The court may permit any information or bill of particulars to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced.

(e) Defendant's Criminal History. Upon the filing of an indictment or information charging a felony, the prosecuting attorney shall request a copy of the defendant's criminal history, as defined in RCW 9.94A.030, from the Washington State Patrol Identification and Criminal History Section.

[Amended effective July 1, 1984; September 1, 1986; March 18, 1994.]

WASHINGTON CRIMINAL RULE 2.2

RULE 2.2 WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest. If an indictment is found or an information is filed, the court may direct the clerk to issue a warrant for the arrest of the defendant. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically or stenographically. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

(b) Issuance of Summons in Lieu of Warrant.

(1) *Generally.* If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) *When Summons Must Issue.* If the indictment or information charges only the commission of a misdemeanor, the court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant will not appear in response to a summons, or that arrest is necessary to prevent bodily harm to the accused or another, in which case it may issue a warrant.

(3) *Summons.* A summons shall be in writing and in the name of the State of Washington, shall be signed by

the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the defendant to appear before the court at a stated time and place.

(4) *Failure to Appear on Summons.* If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) *Execution of Warrant.* The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) *Service of Summons.* The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is

brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall, on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) *Amendment.* No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) *Issuance of New Warrant or Summons.* If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

[Amended effective September 1, 1983; September 1, 1986; September 1, 1995.]

WASHINGTON REVISED CODE 36.27.020

36.27.020. Duties

The prosecuting attorney shall:

(1) Be legal adviser of the board of county commissioners, giving them his or her written opinion when required by the board or the chairperson thereof touching any subject which the board may be called or required to act upon relating to the management of county affairs;

(2) Be legal adviser to all county and precinct officers and school directors in all matters relating to their official business, and when required draw up all instruments of an official nature for the use of said officers;

(3) Appear for and represent the state, county, and all school districts subject to the supervisory control and direction of the attorney general in all criminal and civil proceedings in which the state or the county or any school district in the county may be a party;

(4) Prosecute all criminal and civil actions in which the state or the county may be a party, defend all suits brought against the state or the county, and prosecute actions upon forfeited recognizances and bonds and actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or the county;

(5) Attend and appear before and give advice to the grand jury when cases are presented to it for consideration and draw all indictments when required by the grand jury;

(6) Institute and prosecute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of felonies when the prosecuting attorney has information that any such offense has been committed and the prosecuting attorney shall for that purpose attend when required by them if the prosecuting attorney is not then in attendance upon the superior court;

(7) Carefully tax all costs bills in criminal cases and take care that no useless witness fees are taxed as part of the costs and that the officers authorized to execute process tax no other or greater fees than the fees allowed by law;

(8) Receive all cost bills in criminal cases before district judges at the trial of which the prosecuting attorney was not present, before they are lodged with the board of county commissioners for payment, whereupon the prosecuting attorney may retax the same and the prosecuting attorney must do so if the board of county commissioners deems any bill exorbitant or improperly taxed;

(9) Present all violations of the election laws which may come to the prosecuting attorney's knowledge to the special consideration of the proper jury;

(10) Examine at least once in each year the public records and books of the auditor, assesor, treasurer, superintendent of schools, and sheriff of his or her county and report to the board of county commisioners every failure, refusal, omission, or neglect of such officers to keep such records and books as required by law;

(11) Examine once in each year the official bonds of all county and precinct officers and report to the board of county commissioners any defect in the bonds of any such officer;

(12) Make an annual report to the governor as of the 31st of December of each year setting forth the amount and nature of business transacted by the prosecuting attorney in that year with such other statements and suggestions as the prosecuting attorney may deem useful;

(13) Send to the state liquor control board at the end of each year a written report of all prosecutions brought under the state liquor laws in the county during the preceding year, showing in each case, the date of trial, name of accused, nature of charges, disposition of case, and the name of the judge presiding;

(14) Seek to reform and improve the administration of criminal justice and stimulate efforts to remedy inadequacies or injustice in substantive or procedural law.

Enacted by Laws 1963, ch. 4, § 36.27.020, eff. Feb. 18, 1963. Amended by Laws 1975, 1st Ex.Sess., ch. 19, § 1, eff. May 6, 1975; Laws 1987, ch. 202, § 205.

WASHINGTON REVISED CODE 10.37.010

10.37.010. Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

Enacted by Laws 1925, Ex.Sess., ch. 150, § 3.